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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-601

BARBARA COREY,

Petitioner,

v.

AVCO-LYCOMING DIVISION, AVCO CORPORATION,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Connecticut entered July 18, 1972.

OPINIONS BELOW

The Memorandum of Decision of the Hearing Tribunal and the Memorandum on Setting Aside Decision and Order of Hearing Tribunal are unreported and are set out in Appendix, pp. 20a thru 28a of Petitioner's original brief. The Opinion of the Supreme Court of the State of Connecticut is unreported. It is set out in the Appendix, pp. 1a thru 19a of Petitioner's original brief.

JURISDICTION

The judgment of the Supreme Court of the State of Connecticut was entered on July 18, 1972. The jurisdiction of this Court rests on 28 USC § 1257 (3).

QUESTIONS PRESENTED

1. Whether or not the issues raised in the Petitioner's Brief in support of a Writ of Certiorari were raised or considered by the Connecticut Supreme Court.

2. Whether or not there was substantial and competent evidence to support the Hearing Tribunal's Decision.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute involved is Section 701 of Title VII of the 1964 Civil Rights Act as amended P.L. No. 92-261, § 11, 86 Stat. 111, amending 42 U.S.C. § 2000e (1970). The constitutional provisions are United States Constitution; First Amendment and Fourteenth Amendment.

STATEMENT OF CASE

Petitioner, Barbara Corey was hired by AVCO Corporation on September 3, 1968 as a rate clerk assigned to the Traffic Division, Department 2K. At the time of her employment and for six years prior thereto, she had been a Seventh Day Adventist.

A few weeks after her employment, Mrs. Corey requested permission to adjust her working hours on upcoming Fridays to observe the Seventh Day Adventist's Sabbath. Permission was denied by AVCO. Notwithstanding the denial, Mrs. Corey left work in accordance with her Sabbath observance and was fired by AVCO.

Subsequently, Mrs. Corey filed a grievance pursuant to the collective bargaining agreement and at the same time filed a complaint with the Commission on Human Rights and Opportunities.

The Arbitration Board decided the grievance against Mrs. Corey on April 28, 1969, which award was confirmed on May 27, 1969.

After investigation, the complaint was certified and the commission caused a public hearing to be held on May 6, 1969. It was at these proceedings that the federal questions sought to be reviewed herein were first raised[1] by Amended Answer to Complaint filed by Avco.[2]

The Hearing Tribunal passed upon these questions in its Memorandum dated August 7, 1969 as follows:[3]

> ". . . The challenge of jurisdiction of the Tribunal is overruled. It is impossible for statutory responsibility of the Commission to be contracted away between employers and employers' unions. Nothing can deprive the Commission on Human Rights of its statutory jurisdiction and responsibility to hear such questions. . . ."

Avco then instituted "a record appeal" of the order of the Hearing Tribunal. The Superior Court on May 28, 1970 entered judgment against the plaintiff. The Court in its Memorandum on Setting Aside Decision and Order of Hearing Tribunal reconsidered the federal questions sought to be reviewed herein and indicated that:

". . . the findings and conclusions of the Board of Arbitra-

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[1]See Appendix (Transcript of May 6, 1969, pp. 5-14, 26-7 and 32-3), pp. 40a thru 50a.
[2]See Appendix (Commission's Exhibit #3 before Hearing Tribunal), p. 32a.
[3]See Appendix specifically #5 of Findings, p. 30a (see also Conclusion, p. 31a).

tion constitute collateral estoppel by judgment binding the Hearing Tribunal . . . By reason of her election of remedies. Complainant was foreclosed . . . etc. . . .[4]

The plaintiff appealed the lower court decision to the Supreme Court of the State of Connecticut and included in its assignments of errors,[5] the federal questions sought to be reviewed in this instance.

Thereafter by decision dated July 18, 1972, the Supreme Court of the State of Connecticut considered said assignments of error and entered judgment of "no error," thereby affirming the lower court's decision.

REASONS FOR GRANTING WRIT

This Brief is being filed to reply to two points raised in the Respondent's Brief in Opposition to the granting of the Writ of Certiorari. These points are that there was not substantial and competent evidence to support the Hearing Tribunal's Decision and that certain questions raised in the Petition for Writ of Certiorari were not raised below.

The Petitioner asserts that there was substantial and competent evidence to support the conclusion of the Hearing Tribunal that discrimination occurred. It is elementary that the definition or standard by which a concept is measured will determine whether or not it exists. This is especially so in the case of something as subtle as discrimination which the Connecticut Supreme Court has ruled often must be established by inference. *International Brotherhood* v. *Commission on Civil Rights,* 140 Conn. 537, 542 (1953). The Petitioner submits that the only reason that the Connecticut Supreme Court did not find discrimination was that the standard it ap-

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[4]See Appendix, p. 20a et. seq.
[5]See Appendix specifically #3, 4, 5, 6, 7 and 10, p. 35a.

plied in defining religious discrimination was incorrect. The Connecticut Courts reliance on the Sixth Circuit's opinion in *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970) rehearing denied, aff'd by an equally divided court 402 U.S. 689 which definition is no longer the correct interpretation of Title VII of the 1964 Civil Rights Act (42 U.S.C. 2000e et seq) if it ever was. The Connecticut Court might have reached a different conclusion but for its reliance on this incorrect interpretation of federal law. This Court should reverse in light of the Equal Employment Opportunity Act of 1972 and allow the Connecticut Court to reconsider the question.

The application of Title VII of the 1964 Civil Rights to the case was considered as early as the arbitration hearing. The question of the interpretation and applicability of Title VII was raised and considered by the Connecticut Supreme Court as can be seen by its reliance on *Dewey*, supra, for both the appropriate standard of religious discrimination and the weight to be accorded a prior arbitration award.

Finally, the issue of the Petitioner's constitutional First Amendment rights was raised below (Pet. App. pp. 35a-36a #10). In this regard, the controlling case of *Katzenbach* v. *Morgan*, 384 U.S. 641 (1965) is sufficient reason, in and of itself, for this court to allow the Writ to issue.

I.

The issue of the Complainant's right to religious freedom was raised in the Petitioner's Assignment of Errors below (Pet. App. pp. 35a-36a #10)[1]. This issue was also briefed before the Connecticut Supreme Court. The enactment by Congress of the Equal Employment Opportunity Act of 1972[2] brings this

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[1]Except as otherwise indicated (Pet. App.) refers to petitioners original appendix, (Pet. Brief —) refers to petitioners original Brief, (Resp. App. —) refers to respondent's appendix, (Resp. Brief —) refers to respondent's brief.

[2]P.L. 92-261 see especially §11, 86 Stat 111 amending 42 U.S.C. §2000e. (1970).

case squarely in point with *Katzenbach* v. *Morgan,* 384 U.S. 641 (1965). In both *Katzenbach* and the instant case Congress had acted to protect important constitutional rights; in *Katzenbach* the right to vote under the Fourteenth and Fifteenth Amendments and in this case the right of religious freedom under the First and Fourteenth Amendments. The question in both cases is identical; whether state laws can be interpreted to abridge the equal protection of the law which Congress, by its enactment of legislation in question, had sought to provide. A Writ of Certiorari should be granted to review the Decision below in light of this Court's holding in *Katzenbach.*

Similarly the interpretation of religious discrimination under Title VII of the 1964 Civil Rights Act[3] and the relationship of arbitration to Title VII proceedings were raised below. As the Connecticut Supreme Court notes, "The plaintiff would have us ignore the *Dewey* rule and follow the Fifth Circuit's decision in *Hutching* v. *United States Industries, Inc.,* (Pet. App. p. 11a, citation omitted). Both of these cases involve the interpretation of Title VII rights. Finally, in reaching its decision the court relied exclusively on *Dewey* v. *Reynolds Metals Co.* 429 F.2d 324 (6th Cir. 1970) rehearing denied, affirmed per curiam by an equally divided court 402 U.S. 689. The issue of the correct interpretation of the Petitioner's rights under Title VII was therefore raised, considered and, in fact, relied upon in the Court's interpretation of the Connecticut Fair Employment Practices Law. The issue of federal supremacy is therefore inherent in the Connecticut Court's Opinion.

II.

There was substantial and competent evidence to support the Hearing Tribunal's Decision; the reversal of the tribunal

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[3]42 U.S.C. 2000e et seq. (1970)

on this point was the result of reliance on an incorrect interpretation of Title VII.

Congress, by its enactment of the Randolph Amendment sought to clearly define religious discrimination in accord with its original intent in enacting the 1964 Civil Rghts Act. The language of the Equal Employment Opportunity Act of 1972 requires accommodation of an employee's religious belief unless hardship can be shown.[4]

The respondent in this case urges, in effect, that these rights are precluded by binding arbitration. The decision of the Board of Arbitration provided in relevant part:

> "6. A review of the matter cited by grievant in her complaint to the Connecticut Commission on Human Rights and Opportunities (Co. Ex. 4), *the EEOC guidelines and opinions issued under Title VII of the Civil Rights Act which were cited and discussed by the advocates of the Parties* during oral argument herein (Tr. 143-145), and the awards of other arbitrators who have been presented with similar special schedule accommodation requests, support the validity of the foregoing conclusion and do not operate to render nugatory the requirement that employees, regardless of race, creed, sex or national origin must obey the uniformly enforced rules with respect to work schedules.
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> 7. The grievant's reiteration at the arbitration hearing of her rejection of the Company offer of March 19, 1969 (Tr. 87), of comparable employment at shift hours which

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[4]Section 701(j) of Title VII of the 1964 Civil Rights Act (as amended) provides:

> "(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

> would not conflict with her religious observance of the Sabbath further confirms the fact that *the Company intent was not discriminatory* but rather the opposite."[5]

It is therefore clear that the applicability of the Guidelines on Religious Discrimination[6] of the Equal Employment Opportunity Commission were involved in this case from its very inception. It is equally clear that the Board of Arbitration was concerned only with discriminatory intent. This however does not conform with this Court's teaching in *Griggs* v. *Duke Power Co.*[7] that:

> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation 401 U.S. 424 at 431 (1971).

The Guidelines mentioned above are similarly aimed at the practices of employers which, though neutral on their face, operate to discriminate against an employee's religious beliefs or practices. The Board of Arbitration's award did not provide that protection.

The respondent's reliance on *Rios* v. *Reynolds Metals Co.*[8] is superficial, at best. The general statement that the Board of Arbitration award met the five standards enunciated by the Court in *Rios* does not withstand close scrutiny. As noted above, the Board of Arbitration was concerned with discriminatory intent and not with the discriminatory effects of practices neutral on their face. Having misapplied the relevant standard for determining discrimination, the decision of the Board of Arbitration was so tainted as to preclude reliance on *Rios*. *Rios*, in fact, would preclude reliance on the arbitration award in this case.

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[5]Resp. App. p. 5a, emphasis added.
[6]33 Fed. Reg. 10296 (1967).
[7]401 U.S. 424 (1971).
[8]____F. 2d. ____, 5 F.E.P. Cases 1 (5th Cir. 1972)

The Hearing Tribunal of the Commission on Human Rights, however, concluded in its Memorandum of Decision[9] that the Complainant had been discriminated against. The Tribunal found that persons of other religious faiths were allowed to take time off (Fact #6, Pet. App. p. 29a) and concluded that Complainant was treated more strictly than others (Conclusion #2, Pet. App. p. 31a). The Hearing Tribunal's findings show that the Complainant was willing to accommodate (Finding #3, Pet. App. p. 30a) but that the respondent had failed to show that there was an attempt to accommodate the Complainant's religious beliefs when she was discharged. (Finding #4, Pet. App. p. 30a).

The decision of the Connecticut Supreme Court also misinterprets the definition of discrimination in determining if there was substantial and competent evidence. The Connecticut Supreme Court notes that the plaintiff and hearing tribunal commit fundamental error by equating "religious discrimination with a failure to accommodate" (34 Conn. L.J. #3 pp. 5-6 Pet. App. p. 12a). The court, citing Dewey, states that it agrees with the Board of Arbitration that an employer should not have to accommodate itself to employees' schedules. However, Congress has indicated that this was exactly what it meant (Equal Employment Opportunity Act of 1972 *supra*). The Guidelines in effect at the time the discrimination occurred required not general assumptions of disruption but:

> (d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people. E.E.O.C. Guidelines on Religious Discrimination 32 Fed. Reg. 10298 (1967).

This analysis was performed by neither the Board of Arbitratime nor the Courts below in this case.

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[9]Pet. App. pp. 28a-31a.

Finally, the Connecticut Court cites *Dewey* v. *Reynolds Metals Co.* supra, for the proposition that an "employer ought not to be forced to accommodate each of the varying beliefs and practices of his employees" Id at 335. The reliance on *Dewey*, a case under Title VII is misplaced for at least three reasons. First *Dewey* was decided under the 1966 Guidelines on Religious Discrimination[10] which did not require accommodation and not the 1967 Guidelines[11] which were in effect at all times in the instant case. Secondly, the decision in *Dewey* has been specifically rejected by Congress in the Equal Employment Opportunity Act of 1972, supra. Finally, as this Court has recently noted, a 4-4 affirmance is not entitled to precedential weight. *Neil* v. *Biggers*, ____ U.S. ____ 41 L.W. 4064, 4066 (1972) citing *Ohio ex rel Eaton* v. *Price*, 364 U.S. 263, 264 (1960).

Therefore, the failure to find substantial and competent evidence was the result of the application of an incorrect standard, that of *Dewey*, and not a lack of evidence by the Complainant before the Hearing Tribunal.

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[10]The less stringent standard as applied in *Dewey* involved the following language in the 1966 Guidelines:

> Section 1605.1 (a):
> "(3) However, the Commission believes that an employer is free under Title VII to establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday."
>
> Section 1605.1(b):
> "(3) The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs."

The language of the 1967 Guidelines, in effect at all times relevant in this case set forth a much stricter standard. See Pet. App. pp. 38a thru 39a.

[11]Pet. App. pp. 36a thru 39a.

CONCLUSION

There was substantial and competent evidence before the Hearing Tribunal to support Complainant's allegations of religious discrimination. Both the Board of Arbitration and the Court below misinterpreted the definition of discrimination; the Board of Arbitration when it looked only at intent and misapplied the Guidelines and the Connecticut Supreme Court in its reliance on *Dewey*. The applicability of federal law was properly before the court below and in any case the Connecticut Court's reliance on federal decisions presents adequate bases for this Appeal. The Connecticut Court's decision, but for *Dewey*, which has been overruled at the very least regarding the definition of religious discrimination, might well have been different (See Pet. App., pp. 13a-19a, concurring opinion of Judge Loiselle.) Accordingly, the Appellant respectfully requests that this Court issue a Writ of Certiorari to review and determine the remaining viability, if any, of its decision in *Dewey* v. *Reynolds Metals Co.*

Respectfully submitted,

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